LIBRARY
SUPREME COURT, U. S.

No. 71-1329

Supreme Court, U. S.
FILED
APR 15 1972
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1971

WILLIAM WARZYNIAK,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Stephen B. Cohen*
George C. Pontikes
11 South LaSalle Street
Suite 600
Chicago, Illinois 60603
Telephone (312) ST 2-2610
Cecil B. Cohen
3609 Main Street
East Chicago, Indiana 46312
Telephone (219) 397-0903
Attorneys for Petitioner

INDEX

	Page
Citation to the Opinion Below.....	1
Jurisdiction.....	2
Question Presented.....	2
Constitutional Provision Involved...	2
Statement of Case	2
Reasons for Granting the Writ.....	6
Conclusion.....	11
Appendices:	
1-Opinion of the U.S. Court of Appeals.....	1a
2-Judgment of the U.S. Court of Appeals.....	5a
3-Order denying Petition for Rehearing.....	6a

LIST OF AUTHORITIES CITED

CASES:

Brady v. Maryland, 373 U.S. 83 (1963).....	9, 11
Giglio v. United States ___U.S.___ 40 LW 4209 (February 24, 1972)....	2, 6, 8, 10
Napue v. Illinois, 360 U.S. 264 (1959).....	10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No.

WILLIAM WARZYNIAK,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William Warzyniak, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 18, 1972 in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit printed in the

Appendix attached hereto, pages 1a-4a is unreported at the present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on February 18, 1972, Petition for a rehearing was denied March 16, 1972. This Petition for Writ of Certiorari will be timely filed on or before April 15, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

The decision in this case by the United States Court of Appeals for the Seventh Circuit is inconsistent with the decision of this Court in Giglio v. United States, ____U.S.____ 40 LW 4209 (February 24, 1972).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution which provides in pertinent part:

> "No person shall...be deprived of life, liberty or property without due process of law;..."

STATEMENT OF THE CASE

On March 25, 1970, an indictment was filed in the United States District Court for the Northern District of Indiana, Hammond Division,

charging that the defendant, WILLIAM WARZYNIAK, did willfully and forcibly assault, resist, oppose, impede, intimidate and interfere with Francis J. Storey, Jr., a Special Agent of the F.B.I., while the latter was in the performance of his official duties in violation of Section 111, Title 18 of the United States Code. (A.5).[1] At trial, the jury returned a verdict of guilty as charged (A.43).

On January 22, 1971, the defendant was sentenced to two years in the custody of the Attorney General, ninety days to be served and the balance to be suspended with the defendant placed on probation for two years upon release from incarceration.

Special F.B.I. Agent Francis J. Storey, Jr., testified to the following: He entered the B&B Tap Room at 2506 Whitecoak Avenue, Hammond, Indiana, on January 22, 1970, at 1:55 o'clock in the afternoon. The defendant was tending bar at the time Agent Storey entered. At 2:00 o'clock p.m., five other Special F.B.I. agents entered the premises. One of them, Agent Cox, gave Agent Storey a search warrant. Thereupon, Agent Storey walked to the passageway leading to the rear of the bar, and announced to the defendant that he was with the F.B.I. The defendant was standing in the entranceway be-

Footnote 1. "A." refers to Appendix below

hind the bar and Agent Storey began explaining to him that he had a search warrant and was authorized to search the area behind the bar. The defendant would not allow defendant Storey behind the bar, ordered him away from the area behind the bar and stated that Agent Storey had no business behind the bar. Agent Storey persisted in explaining his authority, which permitted him to go behind the bar, and the defendant persisted in his refusal to allow him in that area.

Agent Storey advised the defendant that he was about to commit a federal offense, if he continued and the defendant stated that he didn't care and that if they didn't leave from around the area behind the bar, that there was going to be a fight.

During the course of his testimony, Special F.B.I. Agent Storey also testified as follows:

Q. Mr. Storey, calling your attention to the afternoon of January 22, 1970, did you have occasion to enter the B&B Tap Room at 2506 Whiteoak Avenue, in Hammond, Indiana?

A. Yes, I did. ...

Q. Mr. Storey, after the phone call was received, how long was it until other people entered the bar?

A. Approximately two or three minutes; about three minutes.

Q. Who else entered the bar at that time?

A. Other Special Agents of the Federal Bureau of Investigation. ... (A. 12-16). (Emphasis added.)

At no time during his testimony, did Agent Storey testify that Assistant United States Attorney J. Frank Kimbrough also entered the bar with the other Agents. Nor did any of the other Special Agents who appeared at the trial so testify.

At the sentencing hearing on January 22, 1971, Assistant United States Attorney J. Frank Kimbrough stated to the Court below as follows:

> "I would like to make a record to the effect that I have never seen a more professional job done, because I was there. There wasn't a gun drawn, I never heard such soft spoken cajolling on the part of the F.B.I. to Mr. Warzyniak who was completely out of control. Yes, they handcuffed him, it took three of them to do it. And at the time they were doing it, he was threatening to beat everybody's brains out in the bar. ..." (A. 34-35).

The petitioner argued to the Court of Appeals below that Agent Storey's testimony was false and that the conviction was in violation of petitioner's due process rights. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below is in direct conflict with the recent decision of this Court in Giglio v. United States, ___ U.S. ____ 40 LW 4029 (February 24, 1972).

The record shows that at the trial, Special F.B.I. Agent Storey was asked to name those who entered the bar in question shortly after he did. He responded that other Special Agents of the Federal Bureau of Investigation entered. He did not testify that Assistant United States Attorney J. Frank Kimbrough also entered the bar at that time. After the trial and the decision on post trial motions, at the time of sentencing, Assistant United States Attorney J. Frank Kimbrough revealed that he was also present.

By failing to testify that Assistant United States Attorney J. Frank Kimbrough entered the bar with the other Agents, Agent Storey testified falsely. The jury below was unaware of this falsehood, and therefore, could not use this information in order to properly judge the credibility of Agent Storey.

The credibility of Agent Storey was crucial to the Government's case below. The Government's

position was that the petitioner interferred with Storey's ability to execute the search warrant in his possession. Since petitioner perpetrated no physical attack upon Agent Storey, the Government's position was primarily substantiated by the testimony of Storey that in his judgment the petitioner would not permit a search behind the bar, that he could not get past defendant in the entranceway without being attacked by the petitioner and because of petitioner's size and that, short of arresting the petitioner, there was no way that the area behind the bar could be searched without interference (A. 12-26). This judgment by Storey was contradicted by his own testimony that Agent Cox was able to gain access to the area behind the bar prior to the petitioner's arrest, by the testimony of Hinshaw that he was able to gain such access prior to the petitioner's arrest (TP, P. 215)[2] and the testimony of Ralph Morenz that Agent Storey could have moved past the petitioner while he stood in the entranceway (TP, p. 269). Accordingly, had the jury found out that Agent Storey testified falsely in this one particular it might have determined that his judgment on this crucial issue was not worthy of belief.

Footnote 2. "TP" refers to the trial transcript.

This Court recently set forth the due process considerations involved when a conviction is obtained by false evidence:

> "As long ago as Mooney v. Holohan, 294 U.S. 103 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959), we said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269. Thereafter Brady v. Maryland, 373 U.S. 83 (1962), held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution.' See ABA, Standards Relating to the Prosecution Function and the Defense Function, Section 3.11 (a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra at 269. We do not, however, automatically require a new trial whenever 'the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict...' United States v. Keogh, 391 F.2d 138, 148, (CA2 1968). A finding of materiality of the evidence is required under Brady, supra at 87. A new trial is required if ' the false testimony could...in any reasonable likelihood have affected the judgment of the jury...'. Napue v. Illinois, Supra, at 271." Giglio v. United States ___ U.S. ___ 40 LW at 4211.

There is no question that the Government suppressed the fact of the presence of Assistant United States Attorney J. Frank Kimbrough at the B&B Tap Room during the occurence in this case. Agent Storey deliberately omitted mention of his presence when asked (A.16) and the other Agents made no mention of his presence during their testimony. (TP, pp. 144-219). The petitioner did not learn of Mr. Kimbrough's presence until the sentencing on January 22, 1971. (A. 34-35). By withholding this information, the Government violated the due process rights of the defendant as guaranteed by the Fifth Amendment to the United States Constitution.

The suppression of this fact violates the rule set forth in Brady v. Maryland, 373 U.S. 83 (1963):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87

The Court below took the position that the failure of Agent Storey to testify as to the presence of Assistant United States Attorney

Kimbrough was not at all related to Storey's credibility and was not material as to the guilt or punishment of the petitioner, so that the rules set forth in Napue and Brady were not violated. (App. pages 1a-4a)[3]

Storey's credibility was crucial. The case for the Government depended substantially upon Storey's judgment that petitioner's acts and words constituted an impediment to his ability to execute the search warrant. In light of the conflicts between Storey's testimony and that of the other agents and witness and the fact of no physical contact between Storey and petitioner, the jury's determination as to whether Storey was accurate and truthful in his estimate that the execution of the search warrant was not possible was very important. That determination could have been affected by the knowledge that he testified falsely in omitting to name the Assistant United States Attorney Kimbrough.

As this Court stated in Giglio:

> "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any under-

Footnote 3. "App" refers to Appendix to this petition.

> standing or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." 40 LW at 4211

In the case at bar, the jury was entitled to know that Storey failed to testify as to the presence of Assistant United States Attorney J. Frank Kimbrough in judging the credibility of Agent Storey.

CONCLUSION

For the reasons stated in this petition it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

Stephen B. Cohen
George C. Pontikes
11 South LaSalle Street
Suite 600
Chicago, Illinois 60603
Telephone (312) ST 2-2610
Cecil B. Cohen
3609 Main Street
East Chicago, Indiana 46312
Telephone (219) 397-0903
Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

No. 71-1206

BEFORE

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. WILLIAM WARZYNIAK, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. Honorable George Beamer, Judge Presiding.

ORDER

Feburary 18, 1972

This is an appeal from a conviction under 18 U.S.C. Section 111 which charged the defendant with willfully interfering with Francis J. Storey Jr., a Special Agent of the Federal Bureau of Investigation, while the latter was performing his official duties. Defendant challenges his

conviction on two due process grounds: He claims that his conviction was obtained through the use of false evidence, and that the Government suppressed evidence favorable to the defendant. We find no merit to either allegation.

Defendant's claims arose out of the alleged conflict between the testimony of Agent Storey during the trial, and statements made by Assistant United States Attorney J. Frank Kimbrough at the subsequent sentencing hearing. In response to the question, "Who entered the bar at the time? "Agent Storey Answered, "Other Special Agents of the Federal Bureau of Investigation." At the sentencing hearing, Assistant United States Attorney Kimbrough stated, "I would like to make a record to the effect that I have never seen a more professional job done, because I was there."

Defendant characterizes Storey's testimony as false and claims his conviction should be reversed under the rule of Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Court held a due process violation where the principle state witness falsely testified that he had received no promise of consideration from the Assistant State's Attorney in return for his

testimony and where the Court found that he had received no promise of consideration from the Assistant State's Attorney in return for his testimony and where the Court found that the challenged testimony may have had an impact on the outcome of the trial. In the instant case, it is not at all clear that Storey's testimony was false since Kimbrough, though present when the alleged "interference" took place, may not have entered the bar at the same time that the other F.B.I. agents did. Even if Storey's testimony on this point were untrue, or at the least, misleading, we cannot say that it had any impact on the outcome of the trial. Unlike Napue, where the challenged testimony concerned a "deal" between the prosecution and the witness Storey's account of who entered the bar along with him was not at all relevant to Storey's credibility. The testimony at issue relates only to Storey's credibility. The testimony at issue relates only to the case in chief and as such it is an insignificant portion of the evidence on which the defendant was convicted.

The credibility of Storey is not affected by the incidents he has testified to but by the fact of Kimbrough's supposedly contradictory statement. Hence, the defendant claims

that the prosecution erred in failing to disclose to him information about Kimbrough's presence, under the rule of Brady v. Maryland, 373 U.S. 83 (1963). Brady requires a showing that the evidence at issue is "material either to guilt or to punishment." Defendant fails to meet this standard; we cannot say that Storey's credibility would have suffered in any major way from the revelation of Kimbrough's presence.

Accordingly, the judgment of the district court is affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

February 18,1972

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. **WILLIAM WARZYNIAK,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. Honorable George Beamer, Judge Presiding.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana , Hammond Division and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be and the same is hereby affirmed, in accordance with the opinion of this Court filed this day.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 2 1972
MICHAEL RODAK, JR., CLERK

No. 71-1329

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM WARZYNIAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1329

WILLIAM WARZYNIAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of having willfully assaulted and interfered with an F.B.I. agent in the performance of his official duties, in violation of 18 U.S.C. 111. He was sentenced to ninety days' imprisonment to be followed by two years' probation. The court of appeals affirmed (Pet. App. 1a–4a).

Petitioner's claim is that remarks of the prosecutor at sentencing were inconsistent with the testimony of the F.B.I. agent at the trial and that he is entitled to a new trial because of the government's failure to

467-258—72

disclose this information.[1] This contention is insubstantial and is adequately answered in the opinion below, upon which we rely (Pet. App. 1a–4a). We add that petitioner's reliance upon *Giglio* v. *United States,* No. 70–29, decided February 24, 1972, is unwarranted. That case, unlike this one, dealt with the government's failure to disclose to the jury an alleged promise of leniency to the key government witness in return for his testimony. Here, as the opinion of the court of appeals points out, had the asserted inconsistency been brought out at trial, it is highly unlikely that it would have affected the agent's credibility, and the relevant testimony was not of crucial importance.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

[1] In testifying that petitioner interfered with his execution of a search warrant, the agent stated that other agents had entered the premises and given him the warrant (Pet. 3). He did not mention that the prosecutor had also entered the premises. This information was provided by the prosecutor at sentencing.

U.S. GOVERNMENT PRINTING OFFICE: 1972